

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION**

**CARDUCO, INC. D/B/A CARDENAS  
METROPLEX,**

**PLAINTIFF,**

**VS.**

**MERCEDES-BENZ, USA, LLC,  
JACK L. HOLT, CRAIG W. DEARING,  
and FRANK J. OSWALD, JR.,  
DEFENDANTS.**

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**CIVIL ACTION NO.**

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**NOTICE OF REMOVAL**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Mercedes-Benz USA, LLC ("MBUSA"), Jack L. Holt ("Holt"), Craig W. Dearing ("Dearing") and Frank J. Oswald, Jr. ("Oswald") file this Notice of Removal to the United States District Court for the Southern District of Texas, Brownsville Division. Defendants state as follows:

1. This matter is a civil action pending in the 445th Judicial District Court of Cameron County, Texas, entitled "CARDUCO, INC. d/b/a CARDENAS METROPLEX VS. MERCEDES-BENZ USA, LLC, JACK L. HOLT, CRAIG W. DEARING, AND FRANK J. OSWALD, Jr.," Cause No. 2011-DCL-03754. Plaintiff Carduco, Inc. ("Carduco") is a Texas corporation and its principal place of business is in Texas.

2. The state court Petition was originally filed on the 2nd day of June, 2011. At that time, MBUSA was the only named Defendant. MBUSA is a Delaware limited liability company and its principal place of business is located in New Jersey. MBUSA was served with the Citation and Petition on June 20, 2011. Accordingly, this Notice of

Removal is timely filed under 28 U.S.C. § 1446(b) within 30 days of receipt of service of the pleading setting forth a claim for relief or other paper from which it may be first ascertained that the case is one which is or has become removable.

3. The district courts of the United States have original jurisdiction over this Action because it involves complete diversity of citizenship among the parties and the amount in controversy is in excess of \$75,000.00. 28 U.S.C. § 1332.

4. An amended state court Petition was filed on July 6, 2011. This amended Petition added MBUSA employees Holt, Dearing, and Oswald as Defendants in their respective individual capacities. Holt, Dearing, and Oswald filed Original Answers in the state court on July 18, 2011. Holt is an individual residing in the state of Illinois.

5. Defendants Dearing and Oswald are individuals residing in Texas. However Dearing and Oswald have been improperly joined or fraudulently joined to this proceeding. Carduco sued Dearing and Oswald under a cause of action for negligent misrepresentation. There is no possibility of recovery against Dearing and Oswald under such theory, based upon the facts alleged by Carduco in its Amended Petition.<sup>1</sup> To prevail under a cause of action for negligent misrepresentation, the plaintiff must show a representation of an existing known fact.<sup>2</sup> Carduco has not alleged such a misrepresentation. Instead, Carduco has alleged what constitutes a promise of future performance by Dearing and Oswald's employer.<sup>3</sup> Furthermore, Defendants Dearing

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<sup>1</sup> See *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. Tex. 1999)

<sup>2</sup> See *Airborne Freight Corp. v. C.R. Lee Enter.*, 847 S.W.2d 289, 294 (Tex. App.—El Paso 1992, writ denied) ("Significantly, the sort of 'false information' contemplated in a negligent misrepresentation case is a misstatement of existing fact.").

<sup>3</sup> See *Griggs*, 181 F.3d at 701 ("[W]hether the plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiffs' allegations and the pleaded theory of recovery.").

and Oswald were employees of MBUSA acting within the course and scope of their employment. They can be liable to Plaintiff for their own negligence when acting within such course and scope only when they owe an independent duty of reasonable care to the Plaintiff *apart* from their employer's duty. Such separate duty did not exist under the facts as pled by Plaintiff.<sup>4</sup> Dearing and Oswald are therefore improperly or fraudulently joined and their presence in this proceeding does not defeat the Court's diversity jurisdiction.<sup>5</sup>

6. Removal of this action is therefore proper under 28 U.S.C. § 1441, since it is a civil action brought in a state court and the federal district courts have original jurisdiction over the subject matter under 28 U.S.C. § 1332 as set forth above.

7. Pursuant to Local Rule 81, attached as Exhibit "A" is an index of all matters being filed. Also pursuant to Local Rule 81, attached as Exhibit "B" is a list of all counsel of record along with required counsel information. Pursuant to 28 U.S.C. § 1446(a) and Local Rule 81, attached hereto as Exhibit "C" is a List of Matters Filed in the State Court Proceeding which contains, as attachments thereto, true and correct copies of all process, pleadings and orders on file in such state court action, along with a copy of the State Court's docket sheet.

8. Defendants, as the removing parties, will promptly give the adverse party written notice of the filing of this Notice of Removal as required by 28 U.S.C. § 1446(d). Defendants will promptly file a copy of this Notice of Removal with the clerk of the 445th

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<sup>4</sup> See *Kingston v. Helm*, 82 S.W.3d 755, 761-763 (Tex. App.—Corpus Christi 2002, no pet.)

<sup>5</sup> See *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (noting that a defendant is entitled to remove to a federal forum unless an in-state defendant has been "properly joined").

Judicial District Court, Cameron County, Texas, where the action is currently pending, also pursuant to 28 U.S.C. § 1446(d).

9. Accordingly, Mercedes-Benz USA, LLC, Jack R. Holt, Craig Dearing, and Frank Oswald, Defendants in this Action, pursuant to these statutes and in conformance with the requirements set forth in 28 U.S.C. §§ 1441 and 1446, hereby removes the case styled entitled "CARDUCO, INC. d/b/a CARDENAS METROPLEX VS. MERCEDES-BENZ USA, LLC, *et al*," Cause No. 2011-DCL-03754 in the 445th Judicial District Court of Cameron County, Texas to the United States District Court for the Southern District of Texas, Brownsville Division on this the 20<sup>th</sup> day of July, 2011.

Respectfully submitted,

/s/ Erin A. Hudson

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**ATTORNEYS FOR DEFENDANTS**  
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**HOLT, CRAIG W. DEARING, AND FRANK J.**  
**OSWALD**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested, on this the 20th day of July, 2011:

Peter D. Marketos  
Adam C. Sanderson  
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/s/ Erin A. Hudson

**EXHIBIT A**  
**INFORMATION REQUIRED UNDER LOCAL RULE 81**

**1. List of Parties**

Carduco, Inc. d/b/a Cardenas Metroplex  
PLAINTIFF

Mercedes-Benz USA, LLC,  
Jack L. Holt  
Craig W. Dearing  
Frank J. Oswald, Jr.  
DEFENDANTS

**2. List of Attorneys**

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**3. Status of Removed Case**

The removed case has been pending in the 445th Judicial District Court of Cameron County, Texas.

**4. Record of Parties Which Have Requested a Jury Trial**

Plaintiff and Defendants have all requested a jury trial



**EXHIBIT B  
DOCUMENT LIST**

1. Plaintiffs' Original Petition (filed June 2, 2011)
2. Citation
3. Plaintiff's Amended Petition (filed July 6, 2011)
4. Defendant Mercedes-Benz USA, LLC's Original Answer (filed July 7, 2011)
5. Defendants Jack L. Holt's, Craig W. Dearing, and Frank J. Oswald, Jr.'s Original Answers (filed July 18, 2011)
6. State Court Docket Sheet